

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1400

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UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Respondent

NO. 76-1400

vs.

ROBERT L. MONIN

BRIEF FOR

APPELLANT

Defendant - Appellant

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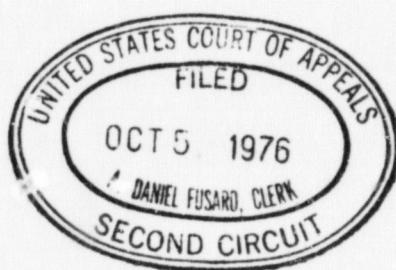


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STATUTES CITED

TITLE 15 U.S.C. §1644 - Fraudulent use of credit card. ---

(a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating \$1,000 or more; or

(b) Whoever, with unlawful or fraudulent intent, transports or attempts or conspires to transport in interstate or foreign commerce a counterfeit, fictitious, altered, forged, lost, stolen or fraudently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(c) Whoever, with unlawful or fraudulent intent, uses any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(d) Whoever knowingly receives, conceals, uses, or transports money, goods, services, or anything else of value (except tickets for interstate or foreign transportation) which (1) within any one-year period has a value aggregating \$1,000 or more, (2) has moved in or is part of, or which constitutes interstate or foreign commerce, and (3) has been obtained with a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card; or

(e) Whoever knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or more tickets for interstate or foreign transportation, which (1) within any one-year period have a value aggregating \$500 or more, and (2) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards; or

(f) Whoever in a transaction affecting interstate or foreign commerce furnishes money, property, services, or anything else of value, which within any one-year period has a value aggregating \$1,000 or more, through the use of any counterfeit, fictitious, altered, forged, lost, stolen,

or fraudently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained -- shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. (May 29, 1969, P.L. 90-321, Title I, c. 2 § 134, as added Oct. 26, 1970, P.L. 91-508, Title V, § 502(a), 84 Stat. 1127; Oct. 28, 1974, P.L. 93-495, Title IV, § 414, 88 Stat. 1520.) CITED PAGES 8, 9.

15 U.S.C. §1602 (k) - (definitions) ... credit card: "means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." CITED PAGE 8.

12 C.F.R. §226.2(r) "Credit card" means any card, plate, coupon book, or other single credit device existing for the purpose of being used from time to time upon presentation to obtain money, property, labor, or services on credit. (Regulation Z). CITED PAGE 11.

OTHER AUTHORITIES CITED

Webster's Third International Dictionary of the English Language (G & C Merriam Co., 1961). CITED PAGE 9.
Black's Law Dictionary, Revised Fourth Edition (West, 1968). CITED PAGE 9.

ISSUES PRESENTED FOR REVIEW

1. Does the making of false oral representations over the telephone, to the effect that one is the holder of an American Express Credit Card, as well as certain bogus account number(s), in order to obtain airline tickets amount to the use of a fictitious credit card for purposes of a prosecution under 15 USC §1644(a),
Fraudulent Use of Credit Card?
2. Should certain oral and written statements made by defendant to two U.S. Postal Inspectors on September 10 and 12, 1975 be suppressed upon the grounds that the Government failed, at the suppression hearing, to show that the defendant intelligently and knowingly waived his rights to remain silent, and to have a lawyer present during interrogation?

STATEMENT OF THE CASE *

The defendant on about fourteen occasions telephoned Alleghany Airlines and ordered airline tickets, representing himself to be a holder of an American Express Credit Card. The defendant used numbers that he had made up or taken from an advertisement. As a result, approximately twenty-eight airline tickets were mailed to the defendant at his home address over a period of about one year. The tickets retail value was over \$5,000.00.

During the same period, the defendant ordered goods from various mail order houses by making in writing essentially the same representations that were made over the telephone to Alleghany. Defendant received about \$ 690.00 (retail) in mail order goods.

On September 10, 1975, the defendant who had just stepped out of the shower and who was shortly to go to work (A-26, TR-46), admitted two men into his apartment, their having identified themselves as being from the Post Office (A-15, TR-11). The kitchen being too narrow, the defendant went with them into his living room (A-16, TR-12). Scattered around were "airline tickets, envelopes with return address of Alleghany Airlines (etc.)" (A-19, TR-16). Then the defen-

* References are to: "A" - Appendix and to "TR" - Transcript Suppression Hearing 6/22/76

dant was read and signed a "waiver and authorization" form (A-17, TR-14). The defendant was not told he was under arrest and there was no explicit reference to criminal proceedings (A-21, TR 31, 32, 34, 35). The defendant was told by Inspector Harm that he was not waiving his rights (A-17, TR-14). The defendant made certain oral admissions. A handwriting sample was obtained during the course of which Inspector Harm told defendant that the "Mail fraud statute would perhaps apply" (TR-30, 31). Shortly prior to leaving, the defendant was served with a grand jury subpoena, which prompted him to ask: "Should I be under arrest?" (A-21, TR-32, 47). Mr. Harm told him to come down to the Post Office the next day "so that we could further discuss the problem..." (A-19, TR-20). The defendant went down to the Post Office two days later at which time he made a written statement (Exhibit 2).

The defendant was indicted for violations of 15 U.S.C. 1644, subsections (a) and (e). Count 1 alleged a knowing use of a fictitious credit card in order to obtain goods and services aggregating in excess of \$1,000.00 in value. Count 2 alleged the knowing use of a fictitious credit card to obtain airline tickets aggregating at least \$500.00 in value. Both counts referred to activities within a one-year period.

After indictment, defendant was assigned counsel by the Court. A motion to dismiss the indictment was denied.

A motion to suppress both the items seized and the inculpatory statements of defendant was denied after a hearing. The defendant, against advice of counsel, entered a plea of guilty to Count 1 of the indictment, while expressly reserving his right to appeal. Defendant was sentenced to two years imprisonment. The execution of sentence has been stayed pending the outcome of this appeal.

ARGUMENT

POINT 1. THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

Count One of the indictment, to which defendant entered a plea of guilty contains as factual allegations that defendant used certain American Express card numbers to obtain goods and services.

In order to reach the \$1,000.00 jurisdictional amount, the value of certain airline tickets has been included.

These tickets were obtained through false oral representations, over the telephone, to Alleghany Airlines, which subsequently sent to the defendant, through the mails certain airline tickets. The false oral representations consisted of assertions by the defendant that he was the holder of an American Express Credit Card, and that the card was number such and such (arbitrary). No physical card was in the defendant's possession at any time.

Absent a physical card, there could be no "use" as required by 1644. The defendant used a telephone to obtain tickets through the mails. The government asserts that the nature of the oral representations in this case has brought the defendant's conduct within the purview of 15 U.S.C. §1644 (a), as the use of a fictitious...credit card.

More precisely, there is here lacking the use of ... "any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor or services on credit". (15 U.S.C. §1602(k)). The undefined modifier, "fictitious", has been read by the District Court as

substantively modifying the explicitly defined term, "credit card".

Further, there are two distinct senses in which the phrase "fictitious credit card" can be used. In one sense, the phrase may refer to an imaginary or non-existent credit card; in a second meaning, the phrase can have reference to a credit card, some part or aspect of which relates or refers to a fiction (e.g. issuer or holder). (See Webster's Third International Dictionary of the English Language, G & C Merriam Co., 1961).

Consider the case of a "fictitious action" which is a lawsuit brought for the sole purpose of obtaining the opinion of a court on a point of law, not for the settlement of any actual controversy (Black's Law Dictionary). In this context, the fiction referred to goes to the qualitative relations between the parties involved, and does not refer to an imaginary or non-existent lawsuit.

Though the term "fictitious" has been in the statute since its initial passage, the 1974 amendments are instructive as to what meaning Congress had in mind in referring to a fictitious credit card. In certain of the new subsections, Congress refers to the sale and transportation across state lines of "fictitious credit cards" (Title 15 U.S.C. 1644 (b), (c), (e)). Obviously, the sale or transport of an "imaginary" credit card would be anomalous.

By analogy, would it make sense, in a commercial context, to legislate with regard to fictitious coins, fictitious currency, or fictitious checks, if the coins, checks or currency were imaginary or non-existent? Rather, common sense dictates that, in a commercial context (Sec. 1644 is clearly for the protection of retailers, and issuers, rather than consumers whose liability is limited by 1643), the fiction referred to in "fictitious credit card" is clearly a fiction to which the card relates (e.g. holder, issuer, etc.) qualitatively rather than the card itself constituting the fiction.

An existing credit card may, on its face, contain the name of a fictitious issuer or a fictitious holder. One type of situation that Congress was likely addressing itself to was the use of credit cards obtained fraudulently under assumed names (e.g. U.S. vs. Mikelberg, 511 F.2d 246 (1975), U.S. v. Green, 494 F.2d 820(1974)). One using such a card, though perhaps ignorant of how it may have been originally obtained, would be guilty of using a "fictitious credit card". The existence or non-existence of the named holder would be irrelevant, as long as the user did not truly intend the holder to be bound by the transaction (cf., Uniform Commercial Code, sec. 3-405(1) b, c). Such a user could not raise the defense that he did not know that the card was "...altered, forged, lost, stolen, or fraudulently obtained". The use of the term "fictitious", in

the sense urged by defendant, was the logical means for Congress to affect the above result. To extend Section 1644 to oral representations by means of a broad definition of fictitious is further to ignore the basic character of a "Credit card" transaction. The very notion of a "credit card" presupposes the use of some existing device, which may be perused by a retailer, rather than relying upon an oral representation. This is recognized by the Federal Reserve Board in their modification of the definition of "credit card" explicitly used by Congress. The Federal Reserve definition makes it clear that presentation is a sine qua non of "use". (12 C.F.R. Part 225, 2(r)).

Would a promise that "the check is in the mail" (to obtain goods, etc.) amount to the use of a "fictitious check"? Even if it did, the likelihood that a statute proscribing the use o. "fictitious checks" would be aimed at that situation is minimal.

The defendant's position that "credit card" does not include oral representations is tacitly approved by the Fifth Circuit in U.S. v. Green (494 F.2d 820, 827). Sitting en banc, the Court said, in part:

"...Section 1644 specifically prohibits the unauthorized use of a credit card itself and is limited to frauds involving the use of such cards..."(emphasis is mine).

Though perhaps not determinative in itself, the fact that the defendant's conduct in the instant case, if coupled

with the requisite intent to defraud, would be proscribed by Title 18 U.S.C 1343, is an affirmative indication that Congress was not addressing itself to as broad a spectrum of transactions as the Government contends.

Any ambiguity in the meaning of "fictitious credit card" must be resolved in favor of lenity toward the defendant and the statute strictly construed. U.S. v. Emmons, 410 U.S. 396, 411 (1972).

The factual situation itself can be categorized, as one in which Alleghany relied solely upon the defendant's oral representation that he was the holder of an American Express Card. This in contradistinction to the situation that Congress was addressing itself to, that of a retailer relying upon the consumer's assertion that a third party will pay for the purchase in conjunction with the presentation of some physical evidence of the issuer's liability provided to the consumer by the issuer. The presentation of commercially reliable "physical evidence" over the telephone takes us into the sphere of electronic funds transfer and is therefore beyond the scope of 1644.

In conclusion, the construction urged upon the Court is consonant with sound principles of interpretation.

The Court below found that Congress intended for "fictitious credit card" to be understood in two separate and distinct senses. By so doing, the substantive scope of

the term "credit card" has been extended to oral representations. In addition, the language in the 1974 amendments to the statute becomes anomalous.

By contrast, the meaning urged by defendant would have direct bearing upon the proof required of the government in a Mikelberg situation. In the case involving a "lost, stolen, forged or fraudulently obtained" credit card, a person using the card, who might be arguably ignorant of the card's origin, would be liable for knowledge that the card was fictitious, if it could be shown that the individual did not intend for the "holder" indicated on the card to be legitimately bound, regardless of whether he exists.

POINT 2. THE STATEMENTS MADE BY THE DEFENDANT TO THE
POSTAL INSPECTORS, WRITTEN AND ORAL, SHOULD BE
SUPPRESSED.

The record shows clearly that the items seized were almost without exception within the "plain view" of the Postal Inspectors upon their entry into the defendant's living room (A-16, 18).

The inspectors appeared to the defendant to be civil agents engaged in a routine investigation. The Miranda Warnings, though contained in the lengthy small type of the "Waiver and Authorization" (Exhibit #1) and read to the defendant were accompanied by an explicit statement by the inspector that it was not a waiver (A-17).

Though defendant may have said he understood his rights, the record does not sustain this legal conclusion. The dubious block letter heading of the Waiver Form and the lack of explicit reference in the Miranda Warnings to criminal proceedings serve to detract significantly from the quality of the government's proof.

The defendant's position is simply that his waiver of his right to have counsel present and to remain silent was not knowingly and intelligently made.

The rights read to the defendant did not put him on notice that criminal proceedings were contemplated. Rather, the defendant saw the situation as one in which his cooperation would assume that the matter would remain civil. Though it may be said that, as a result of the warnings, the defendant should have known his rights, it is the defendant's position that as a matter of fact, he did not.

The background and experience of the defendant is devoid of any prior criminal activity. To date, he has been employed for over four years in institutional employment (A-31).

The conduct which brought about the investigation showed a lack of criminal planning or foresight, as did the defendant's admission of the inspectors to his living room (A-12).

The most revealing part of the record is the explanation

by Mr. Harm to defendant as to the purpose of his forthcoming visit to the Post Office, to wit: "so we could further discuss the problem" (A-19).

The principle contradiction in the record goes to the factual question of whether mention was made by the defendant to repay the airlines. Strangely, Inspector Harm, who had made reference during his interview with the defendant to "mail fraud" did not elicit any statement from the defendant with regard to his intent vis a vis the airline (TR-39). The defendant, on the other hand, recalled discussing the matter, and was surprised at the Inspector's poor recall (A-27, TR-48).

The factual question of the defendant's naivette (A-34) was not expressly resolved by the District Court. In concluding that the government was "entitled to proceed on the fair import of what defendant was told and what he said he understood" (A-34), the District Court failed to include in its analysis the background and experience of the defendant as it appears on the record.

Note that Mr. Harm helped the defendant in drafting his written statement in both generalities and specifics (A-24(bottom), A-25). Note that what Mr. Harm refers to as "et cetera", may be precisely the language quoted by the Court in its Memorandum (A-33) and which Mr. Harm dictated verbatim. The District Court places too much weight upon the observance of formalities.

The Record, as a whole, does not sustain the finding that the government has carried its heavy burden of proving a knowing, intelligent waiver. The government's burden is a heavy one, and there is a strong presumption against waiver. United States v. Hayes, 385 F.2d 375, 377 (1967). Also see Coughlan v. United States, 391 F.2d 371, 372 (refers to "heavy burden of proving a waiver").

CONCLUSION

Defendant prays the Court to reverse the orders of the District Court (1) denying defendant's motion to dismiss the indictment, and (2) denying the defendant's motion for suppression of certain evidence, and, in addition, thereby vacating the Judgment of Conviction rendered against him, and for any further relief which the Court should deem appropriate and just.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:

BARBARA PAWELA, being duly sworn, deposes and says:
deponent is not a party to the action is over 18 years of
age and resides at Buffalo, New York. On October 2, 1976,
deponent served the within BRIEF FOR APPELLANT and
APPENDIX upon THE UNITED STATES ATTORNEY, Attorney for
the Plaintiff - Respondent in this action, at 5th Floor,
Federal Courthouse Building, Buffalo, New York 14202
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in-a post office- official
depository under the exclusive care and custody of the United
States Postal Service within the State of New York.

3 copies sent

Sworn to before me this
2nd day of October, 1976.

Christopher J. Jones

CHRISTOPHER J. JONES
Notary Public - State of New York
Qualified in Erie County
W. Commission issued March 30, 1978